No. 2665.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Wm. H. Moore, Jr., Trustee in Bankruptcy of the estate of Berlin Dye Works & Laundry Company, a corporation, bankrupt,

Appellant,

vs.

C. K. Douglas,

Appellee.

BRIEF OF APPELLEE IN ERROR.

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STATEMENT OF THE CASE.

(Numbers refer to page of Transcript.)

(Italics ours unless otherwise indicated.)

We believe that, for the purpose of clarity in a discussion of the matter hereinafter attempted, it is proper that we make a chronological statement of the steps in the case, which are as follows, to-wit:

(a) July 11th, 1913, judgment for $10,000.00 damages was rendered in the Superior Court, Los Angeles

county, state of California, in favor of C. K. Douglas and against the bankrupt [pp. 3 and 4].

(b) September 10th, 1913, the bankrupt appealed from the judgment to the Supreme Court of the state of California.

NOTE: Bankrupt proceeded with said appeal without order of referee; executed a cost bond in the sum of $300.00; but did not execute a *supersedeas* bond as provided in the Code of Civil Procedure of California, section 942 [p. 12].

(c) October 7th, 1913, judgment of bankruptcy was entered herein, upon petition filed September 15th, 1913 [p. 12].

(d) February 14th, 1914, claim of C. K. Douglas, based on a duly certified copy of said judgment, filed before referee [p. 13].

(e) April 17th, 1914, stipulation filed and motion made to advance and submit said appeal in the Supreme Court, which was done [p. 13].

(f) April 21st, 1914, the claim of Douglas presented to the referee for allowance; oral objection was made thereto, and the referee by order declared a dividend thereon, but suspended payment [p. 13].

(g) June 23rd, 1914, formal written objection filed on behalf of trustee to the claim of Douglas.

(h) December 17th, 1914, said judgment of lower court in said appeal duly affirmed by the Supreme Court of this state, becoming final January 16th, 1915, as shown by affidavit of E. B. Drake filed January 18th, 1915 [p. 9]. (Reported in 169 Cal. at p. 28.)

(i) February 1st, 1915, hearing on question of allowing the claim of Douglas before referee.

On Apr. 6, 1915, referee refused allowance of Douglas' claim [p. 14].

On July 6, 1915, referee's decision was reversed by Judge Oscar A. Trippett, U. S. district judge [p. 38].

POINT I.

The Claim of Douglas was a Provable Claim Sept. 15, 1913.

We contend that the claim of Douglas was in no sense an "unliquidated claim for tort" or an "unliquidated claim" upon anything Sept. 15, 1913, but, on the contrary, was at that time a *"liquidated"* claim, as shown by a certified copy of judgment A.

Definition of Black's Law Dictionary thereof:

> *"Unliquidated damages are such as are not yet reduced to a certainty in respect of amount.*
>
> *"Liquidated damages is applicable when the amount of the damages has been ascertained in the judgment in the action.*
>
> *"Liquidated: Ascertained, fixed, settled."*

We do not believe it will be seriously contended that a claim, whether arising *ex contractu* or *ex delicto,* is not a liquidated one when a judgment has been rendered thereon fixing the amount in dollars.

Learned counsel for appellant argue that "in California a judgment from which an appeal is pending, or the time for appeal has not expired, is no judgment." The only effect an appeal has upon a judgment is, we contend, that it may not be received in evidence as long as it is pending on appeal, but we do not understand the decisions cited to hold that a judgment appealed from is *no judgment.*

The cases cited by counsel merely hold that the judgment is not receivable as evidence—that is, by reason of appeal it has lost its *probative* force—held in abeyance *pro tempore.*

Section 942, Code of Civil Procedure of this state, provides:

> "If the appeal be from a judgment * * * directing the payment of money, it does not stay the execution of the judgment * * * unless a written undertaking be executed on the part of appellant. * * *"

From this it would seem that the judgment is very much alive pending the appeal and the mere matter of appeal does not, *per se,* wipe out the judgment altogether.

It is a rather anomalous position, it seems to us, to assume that an appeal, which does not satisfy or suspend the collection of the judgment, would, however, make the claim based thereon *non-provable.*

Learned counsel's statement that the judgment was "not provable in bankruptcy" because it was "an unliquidated claim for tort," is wrong as to premise and the matter falls because it was not at the date of bankruptcy "an unliquidated claim for tort" and was not in any sense "unliquidated," but, on the contrary, was *liquidated.*

We might say that it is fundamentally true that the competency of evidence is considered as of the date it is offered, then certainly the judgment in this case on February 1st, 1915, was competent evidence, *prima facie* of all recitations therein; if so, on that date we had not

only a *provable,* but a *proved* claim, and it is immaterial whether it could be proved at the date of bankruptcy or not, because the claim of Douglas was in no sense considered to make the number or amount that is required under the Bankruptcy Act of 1898, upon which the adjudication was made.

The *Yates* case (8 A. B. R. 69), cited by counsel, was determined on motion of one Risdon to vacate the decree of the court by which one Yates was upon his voluntary petition theretofore adjudged a bankrupt. The only debt mentioned in the schedule filed with the petition is described as a judgment in favor of Risdon for $894.00 in the Superior Court of Napa county. The ground of the motion was that Yates is not a bankrupt, because there was no other debts against him than this. *It appeared upon the hearing of the motion that the judgment was obtained in an action for wilful and malicious injury to the person of Risdon. After its rendition and before the decree of adjudication in bankruptcy, an appeal was taken from the judgment to the Supreme Court of the state and that the appeal was then pending.*

It is necessary for a bankrupt to owe something before he can be adjudged a bankrupt, for this is included in the very definition of the word "bankrupt." The judgment was not provable—that is, was not capable of being proved *at the time of adjudication of bankruptcy,* because a judgment is only *provable* by the profert thereof, or by a duly certified copy thereof; therefore, it follows *In re Yates* that when the adjudication of bankruptcy was had there was no claim of

Risdon's that could have been *proved* for lack of legal evidence.

This might be analogous to the case at bar, if the referee had decided, when the claim was filed at the first hearing before judgment became final, that appellee had no claim because he *could not prove it* under the rule of evidence in California, that a judgment must be proved alone by an exemplification thereof.

The reasoning of Judge DeHaven *In re Yates* was that it would produce an anomalous condition of record to adjudge a man a bankrupt while the judgment which rendered him an insolvent was pending on appeal, which might be reversed by the Supreme Court; this was probably the reason for the language used at the foot of said opinion as follows (p. 71):

> "It will be time enough for him to apply for relief under the Bankrupt Act and to ask the court to pass upon the many questions which may arise in such proceeding, when it shall be ascertained that he is indebted to some person upon a claim provable under the Bankrupt Act."

His Honor *In re Yates* used this language:

> "* * * but a cause of action against him for unliquidated damages for a personal tort, such as is involved in the action of Risdon v. Yates before referred to, is not within either of the classes named."

Respectfully, we suggest (not in criticism) that this language, *supra,* must have been used inadvertently by the learned court in discussing this question.

We are unable to see why a judgment which was

merely appealed from could be called "a cause of action for unliquidated damages for a personal tort," if it is considered Judge DeHaven so meant. This would be legally true if applied to the cause of action before the judgment was rendered thereon, *but not so after the rendition of judgment.*

"Liquidation" does not mean any more than the word "final," but probably as much, and that is what a judgment is called in California entered in a case like the one at bar, whether appealed from or not.

Code of Civil Procedure, sec. 950.

In re Yates (p. 70), quoting:

> "It has been repeatedly held by this court that the operation of a FINAL JUDGMENT * * *,"

referring to the judgment pending appeal.

We are unable to understand how it can be said, either legally or academically, that a final judgment is *unliquidated.*

It must also be noted *In re Yates* that the judgment under discussion was one for *"wilful and malicious injury to the person of Risdon,"* and was not a debt or judgment from which the bankrupt under any state of case could be discharged.

Bankruptcy Act, section 17, among other things, provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are

> "2. * * * *for wilful and malicious injuries to the person or property of another."

It would, therefore, appear to anyone, not necessarily a logician, that if the Risdon judgment under consideration in *In re Yates* was not one from which he could be discharged, it was not one that would be provable whether the judgment was final or not.

As a basis for the opinion of *In re Yates*, it further appears (p. 71) that *In re Maples* (105 Fed. Rep. 919) is cited as authority for the ruling in that case. From an examination of that case it appears that the seduction of a female is held to be *"wilful and malicious injury to the person"* within the meaning of the Bankruptcy Act of 1898, section 17a, sub-section 2, from which the defendant could not be released by discharge in bankruptcy, and, therefore, a voluntary petition on his part to be made a bankrupt, which scheduled no other claim, is not sufficient, because it is not a provable debt.

In re Hirschman (104 Fed. Rep. 69) is referred to *In re Yates* as authority, referring to the well-considered opinion of Judge Marshall therein.

There is nothing, we think, in that case that holds that a *judgment* was an *"unliquidated action for tort,"* but, on the contrary, the opposite appears, and the learned opinion cannot be read by one without forcing the reader to that conclusion, and without quoting therefrom the court's attention is particularly invited to the bottom of page 70 and top of page 71, in which it is virtually held that where damages have been reduced to a judgment before the adjudication that it is a provable debt, making the exception, however, of wilful injuries to person.

Further, it appears in *In re Yates* that there was but one claim scheduled, to-wit, a judgment for "wilful and malicious injury to the person of Risdon," and from which the petitioner for bankruptcy could not be discharged, and the court merely held that it would be a work of supererogation on the part of the court to adjudge a man a bankrupt for the purpose of discharging him against a debt which was not dischargeable.

The court will also note that the reference in Judge DeHaven's opinion just under consideration as to a provable debt at the time of the filing of the petition could have no authoritative effect here, for he was discussing a jurisdictional question which was applicable to that particular situation and no other. It must appear that there was a provable or dischargeable debt existing at the time of the filing of that petition, while in the case at bar Douglas' claim was in no sense a part or parcel of the original petition for involuntary bankruptcy of this bankrupt.

We suggest that *Stockwell v. Woodward,* 52 Vt. 228, is a case more nearly in point. The syllabus:

> "A discharge in bankruptcy is not a bar to a debt for costs taxed pursuant to a judgment for costs alone where the judgment is rendered and the costs are taxed after the filing of the petition, although the action was begun before the filing."

We concede that costs accrued after the filing of the petition for bankruptcy would not be provable part of a claim, and the court will note that we have not included our costs in the Supreme Court as part of our claim herein in the supplemental affidavit of counsel, filed January 18th, 1915.

In the latter part of the syllabus, under the head of *Semble* (meaning that a court might decide that if it was before it, or the reporter did not know what was decided), it might appear from casually looking at it that a judgment for tort was not a provable debt, but a full consideration of the case appears to hold otherwise. At the bottom of page 234:

> "The rule is that where the action is for a tort or, as in the present case, the recovery is for costs alone * * * *and final judgment is not rendered or the costs taxed until after the date of the filing of the petition*, or that named in the discharge, the certificate is no bar."

Logically, the obverse would be true.

Douglas' judgment was rendered two months before the filing of the petition herein. The difference is apparent.

In re New York Tunnel Co. (20 A. B. R. 25) it is held (at bottom of page 27):

> "JUDGMENTS RENDERED BEFORE BANKRUPTCY, WHETHER BASED UPON LIABILITY FOR TORT OR CONTRACT, ARE EXPRESSLY PROVABLE UNDER SECTION 63a."

Remington on Bankruptcy, we find in vol. 1, sec. 635, page 376, the following:

> "Claims *ex delicto* for money cannot be proved as such. Thus an unliquidated claim for damages for personal injury is not a provable claim and is not susceptible of being made a provable claim. * * *
>
> "BUT IF REDUCED TO JUDGMENT BEFORE THE FILING OF THE BANKRUPTCY PETITION MAY BE PROVED AS A JUDGMENT."

It clearly appears from the above that there is a wide and well defined distinction in law between a "claim" and a "judgment."

It may be conceded that the validity of the claim would be determined as of the date of the adjudication of the bankrupt, which in this case was September 15th, 1913, two months after appellee's judgment was rendered.

Our contention is that Douglas was a creditor of the bankrupt from the date of his accident, if it may be considered that the judgment in this case (in the absence of any proof) was founded upon a tort. It must be known to this Honorable Court that a jury trial on July 11th, 1913, must have arisen from a cause of action months prior thereto; therefore, it follows that the debt or demand of appellee became and was subsisting from the date of the accrual of the cause of action.

It has been held in a case for slander that the person having a cause of action thereon is a creditor before the judgment is obtained.

Chalmers v. Sheehy, 132 Cal. at p. 465.

Quoting from the same page as follows:

> "The principle has been applied to other forms of torts or causes of action arising *ex delicto,* and it is held that the injured party becomes a creditor when the cause of action accrues. (Cases cited.)"

We believe that counsel's argument on the question of "debt" as used in the Bankruptcy Act is too restricted. For instance, in the case of *Melvin v. State,* 121 Cal. at p. 24, we find the following:

"Appellant contends, however, with great earnestness that the term 'debt created' does not cover a case like the present. It is true that the primary definition of 'a debt' is a sum of money due by certain and express agreement. (3 Blackstone's Commentaries 154.) 'An action at law to recover a specified sum of money alleged to be due.' (Burrill's Law Dictionary.)

"The term 'debt,' however, has a much broader popular significance than the foregoing technical definition, and includes that which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another, or to perform for his benefit; thing owed; obligation; liability. (Webster's Dictionary.)"

A "debtor" is further defined in said opinion as follows:

"A debtor is one who owes anything, or who is under obligation arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another."

For instance, we find in the Civil Code of the state of California, section 3429:

"A debtor, within the meaning of this title (title I), is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent."

Same code, section 3430, is as follows:

"A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of money."

Then it would appear to our mind that Douglas had a "debt" against the bankrupt before his adjudication, and by his certain action in the Superior Court the same was liquidated into a ten thousand dollar judgment.

Counsel argue that appellee's judgment at the time of the filing of the petition in bankruptcy was not a fixed liability evidenced by a judgment "absolutely owing."

There can be no contention, it seems to us, that a judgment rendered would be "owing" where it had not been paid or superseded on appeal by a bond as provided by the Code of Civil Procedure of this state, and the only word then that could qualify the claim by which the bankrupt could escape the payment of this claim is the restricted meaning of the word "absolutely" contended for by learned counsel.

The fact that the Supreme Court of this state affirmed the judgment, holding that there were no errors therein (169 Cal. 28), determines that the matter was "absolutely owing" at the time of its rendition. While the word "absolute" may have the same meanings as contended in the definition cited by counsel, it likewise has other meanings; for instance, in Webster's Unabridged Dictionary we find as part of the definition of the word "absolute" the following:

> "1. Absolved; freed; disengaged.
>
> "2. Free from imperfection; complete in its own character; perfect; whole; complete."

We think that a debt or demand might be "absolutely owing" and yet a defense be filed thereto, and

an appeal from a judgment rendered thereon might be pending.

We believe that the fact that the word "instrument in writing" used in the same connection with judgment, which is modified by the words "whether then payable or not," gives some light upon the words "absolutely owing" and does not restrict its meaning to the word "finality" as applicable to a judgment in a court.

A person might at the date of the petition have given a promissory note that was not due and defense might be made thereto by the maker in a suit at law, yet it would be "absolutely owing" if it was determined by the court later that the defense was of no concern or importance, which was done in the case at bar.

It seems to us that Congress intended by the enactment of this section to provide for the contingency, where a further attack was made upon a judgment, by appeal, because this section might read:

"1. A fixed liability as evidenced by a judgment, *whether then payable or not.*"

Quoting from the opinion of the learned district judge who tried the case in answer to this proposition, we find [bottom p. 40, trans.]:

"The judgment rendered in favor of the claimant was final and created an absolute liability of the bankrupt. Notwithstanding the appeal from the judgment, it could not be reversed or modified. This is necessarily so because the judgment contained no error or infirmity upon which the Supreme Court could predicate a reversal or modification. The question is asked, however, how is this court to know whether or not it would be reversed or modified until the appeal is finally dis-

posed of? That can be ascertained by an inspection of the record, or by postponing the matter until the Supreme Court acts."

(a) The word "absolute" has various significations, which it receives in popular use. It means "complete, unconditional, not relative, not limited, independent of anything extraneous." In its signification of "complete, not limited," it is used in the law to distinguish an estate in fee from an estate in remainder.

Johnson's Admr. v. Johnson, 32 Ala. 637.

(b) The term "absolute" as used in insurance policies has been held to be synonymous with "vested" and used in contradistinction to "contingent" or "conditional."

German Fire Ins. Co. v. Stewart, 42 N. E. 286.

(c) Absolute drunkenness, within the meaning of the rule that absolute drunkenness is a defense against contracts made while in a state of absolute drunkenness, does not mean complete insensibility. A man may be absolutely drunk without being dead drunk.

Cavender v. Waddingham, 5 Mo. App. 457.

(d) An "absolute guaranty" is an unconditional promise of payment or performance on default of the principal.

White Sewing Mach. Co. v. Powell, 74 S. W. 746.

(e) An "absolute guaranty," in the law of negotiable instruments, is an unconditional undertaking on

the part of the guarantor that the maker will pay the note.

Beardsley v. Hawes, 40 Atl. 1043;
Eshberg-Bachman Leaf Tobacco Co. v. Heid, 62 Fed. 962.

(f) In a condition of policy providing that any interest in property insured, not "absolute," must be represented to the company, the word "absolute" refers to the character or quality of the estate, and is synonymous with "vested," and used in contradistinction to "contingent" or "conditional."

Wooddy v. Old Dominion Ins. Co., 31 Am. Rep. 752;
Hough v. City Fire Ins. Co., 29 Conn. 10;
Gaylord v. Lamar Fire Ins. Co., 40 Mo. 13.

(g) The term has no fixed, unvarying meaning, when used in connection with an interest in property. It is not always synonymous with "unqualified."

Washington Fire Ins. Co. v. Kelly, 32 Md. 421.

(h) An equitable title, that would be protected by a court of equity as such, may be an ownership as "absolute" as the legal title.

Gaylord v. Lamar Fire Ins. Co., 40 Mo. 13.

(i) Property is "absolute" when an external object or thing is objectively and lawfully appropriated by one to his own use in exclusion of all others.

Griffith v. Charlotte etc. R. Co., 23 S. C. 25.

(j) An "absolute sale" is one where the property in personal chattels passes to the buyer upon the completion of the bargain or treaty between the parties.

Truax v. Parvis, 32 Atl. 227.

(k) An "absolute total loss" takes place when the subject insured wholly perishes, or there is a privation of it and its recovery is hopeless.

Morray v. Great Western Ins. Co., 25 N. Y. Supp. 414.

(l) Rev. St. c. 86, sec. 55, cl. 4, providing that no trustee (garnishee) shall be charged unless at the time of the service of the writ the amount due the defendant is "due absolutely," was construed to require only that the debt should have been fully created, and did not require that the time for payment thereof had expired. Thus, where a railroad company was garnished on the 4th of June to subject an employee's pay earned in May, the company was properly charged, though by its contract with the employee the amount so earned was not payable until June 15th.

Ware v. Gowen, 65 Me. 534.

We contend that from the foregoing it would appear that a judgment, rendered two months before the filing of the petition in bankruptcy, and which it was afterwards held by the Supreme Court on appeal that there was no error therein, was "absolutely owing" at the time of the filing of such petition.

POINT II.

Appellee's Contention is that he made a Prima Facie Case which was not met by the Trustee, Otherwise the Claim is Payable.

The claim of appellee being based upon a judgment which is now receivable in evidence is *prima facie* provable and allowable, and as a matter of law was *prima facie* provable and allowable at the time that the original claim was filed. From this record it would appear that he had a claim at that time, the proof of which was merely suspended by appeal, for $10,000.00 damages, and it does not appear in the judgment that the claim is, or was ever based upon a tort of any kind, and the word "damages" as used in the certified copy of the judgment [p. 5] could not be construed to mean in any sense a tort action, because this Learned Court will, no doubt, bear in mind that there are many actions for "damages" that are not based upon a tort for personal injuries; as a matter of fact, actions for damages for torts are but *one* small branch of the general actions at law sounding in damages; and in the absence of an affirmative showing on the part of counsel for the trustee in this record, they would now be estopped to raise that question against a *prima facie* case as shown by claimant's demand established by a final and conclusive judgment.

POINT III.

The Written Objections of the Trustee Filed Herein are not Sufficient to raise the Question Asserted in Counsel's Brief.

As we understand it, the pleadings in this proceeding are confined alone to the claim and the written objections filed thereto, which go to form the issue to be decided, and it is necessary to look thereto to determine the issue here.

The first written objection of trustee mentioned is [p. 7]:

"That said *claimant is not entitled* to prove a claim against the above named bankrupt estate."

We suggest that this is a mere conclusion of the pleader (if anything) and would not in any sense raise an issue, and nothing is shown specifically or definitely therein as to why the claimant would not be entitled to prove a claim against the bankrupt estate; seems to refer to some *personal* inability on the part of Douglas to file a claim.

We are sure that the objection should have been so specific that it would form an intelligent legal issue upon which proof might be heard and law submitted thereon. This may appear technical, but "He that lives by the law, may die by the law." Counsel for trustee are contending for a technical construction alone here to avoid allowance of the claim, and we have a right likewise to meet the same—if we can.

Then if specification "I" is not sufficient and is meaningless considered alone, it must be read in connection with specification "II"; then if "I" and "II" are read to-

gether, and this must be if we are to intelligently determine what is being driven *at*, we find that the objection is to the proof value of judgment alone (quoting) *because it "is not a final judgment, the same having been appealed from by the bankrupt and not having been decided by the Supreme Court";* all of which is now obviated by the final decision of the Supreme Court affirming said judgment—thereby relieving its evidenciary infirmity. The objection goes to the probative infirmity of the judgment and not to the basis thereof.

There is no objection, expressed or implied, to Douglas' claim because it is (presumably) based upon a judgment for personal tort.

It is simply this way:

On the first hearing (April 21st, 1914), he offered his proof of judgment, which was orally objected to, and the matter was held in abeyance by order of referee until the state Supreme Court could pass upon the question to determine whether the judgment became final. The judgment did become *finally* final and was offered and received in evidence on the hearing February 1st, 1915, and we contend it is conclusive of all questions, thereby making the claim of Douglas provable and payable herein.

POINT IV.

A Judgment, Based upon a Cause of Action for Personal Injuries growing out of Simple Negligence, which is Rendered before the Filing of the Petition for Adjudication of Bankruptcy, is a Provable and Dischargeable Debt Against the Bankrupt Estate.

(A) It is held that a judgment growing out of a suit for unliquidated damages for breach of promise to marry against the bankrupt, is a provable and dischargeable claim, and this was based upon a judgment dated January 24th, 1900, for $3295.80, while the defendant became a voluntary bankrupt on the 13th day of March, 1900, in the state of New York.

In re McCauley (U. S. Dist. Court. E. D., N. Y. 1900), 101 Fed. Rep. 223, 4 Am. B. R. 122.

(B) *In re Lorde* (U. S. Dist. Court E. D., N. Y. 1906), 144 Fed. Rep. 320, 16 Am. B. R. 201:

By the court:

"The bankrupt Lorde had control of an apartment house. A tenant therein kept a dog. It bit a boy. Lorde was informed thereof. Thereafter the dog bit another boy. Lorde was sued for the injury. The complaint stated *'that the defendant wrongfully and negligently suffered such dog to go at large without being properly guarded or confined.' The plaintiff recovered judgment. The question is whether Lorde may be discharged from such judgment, and an execution against his body stayed, or was his act a wilful and malicious injury to the person within the meaning of section 17a, subd. 2 of the Bankruptcy Act of July 1, 1898.* * * *

"The judgment is dischargeable in bankruptcy, and the proceedings for the arrest of the bankrupt should be stayed."

This is exactly in point here.

(C) *In re Buchan's Soap Corporation* (U. S. Dist. Court So. D., N. Y. 1909), 169 Fed. Rep. 1017, 22 Am. B. R. 382:

"When an action on an unliquidated claim is pending in a state court at the time that bankruptcy occurs, and the receiver or trustee applies for an order to stay proceedings in such action, such an order is usually made, in view of the greater simplicity and promptness of a proceeding before the referee; *but if a trustee does not apply for a stay, and permits the case to go to judgment, in an action pending in a state court, the claim is thereby liquidated, and the judgment affords proper proof of the amount of the claim as liquidated.* * * * If the trustee is dissatisfied with the amount of the judgment, his remedy is to apply in the state court to open the default. If no application is made, or if such an application is made and denied by the state court, I think that the proof of claim on the judgment should stand."

Is there any difference in the legal principle announced here and in the case at bar? We think not.

(D) *In re Putman et al.* (U. S. Dist. Court N. D., Cal. 1911; by Farrington, judge; 193 Fed. Rep. 464), in our opinion, if not conclusive, is very respectable authority on the question of the allowance of a judgment, even should it be held that the Douglas judgment is for personal injuries based on tort.

On an examination of this case, *supra,* we find that the question of whether or not a judgment for personal injuries for simple negligence is a provable claim under the Bankruptcy Act of 1898, arose and was decided because the alleged bankrupt demurred to the petition therein of three creditors, contending particularly that Kate C. Putman had no provable claim because hers was based upon a judgment for ten thousand dollars growing out of injuries caused by simple negligence, or, as counsel for the trustee might call it, based on an "unliquidated claim for tort," and therefore the petition must fall because he did not have sufficient parties thereto with provable claims.

His Honor, Judge Farrington, in deciding this question, uses this language (p. 468):

> "'Creditor shall include any one who owns a demand or claim provable in bankruptcy. * * *'"
> * * * * * * * * * * * *
>
> "'(1) A fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not * * *'
>
> "In section 17 it is provided that a discharge in bankruptcy shall release a bankrupt from all his provable debts, with a few specified exceptions, none of which are material to this opinion.
>
> "*We have here an unsatisfied judgment in favor of the alleged creditor,* and an unpaid stock subscription against the alleged bankrupt. *Each, in itself, in my opinion, is a provable claim; the first, because it is a judgment;* the second, because it is founded upon a contract.
>
> "'A fixed liability as evidenced by a judgment * * * absolutely owing at the time of the filing

of the petition' against the bankrupt is a provable claim.

"There is no qualification in this language indicating that Congress intended to distinguish between judgments ex contractu and judgments ex delicto.

"Collier in the last edition of his work on bankruptcy, page 700, says that *judgments grounded in tort are, almost without exception, provable.*

"In Remington on Bankruptcy, sec. 680, it is said that *'judgments for personal injury and other similar torts not capable of being presented in form ex contractu are provable, although the unliquidated claims for torts themselves would not be provable.' In re* Lorde (D. C.), 144 Fed. 320; 1 Remington on Bank., p. 706."

POINT V.

If there was any Infirmity in the Judgment on the First Hearing on the 21st of April, 1914, That was Removed at the Last Hearing on February 1st, 1915, by the Affirmance of the Judgment on Appeal by the Supreme Court on December 17th, 1914.

Even if it is considered that under the law of the state of California a judgment that has been appealed from and not superseded prevents it from being introduced in evidence, yet the court may, and it is the practice, to suspend the hearing or defer the hearing until such infirmity is removed.

When this matter came on for the first hearing on April 21st, 1914 [trans. p. 13], and oral objections were made to the allowance of the claim, "a dividend was declared on all claims proved, but not allowed was suspended," and the hearing by consent of all parties was

delayed until the action of the Supreme Court. And to show that this was done there was a stipulation entered into [trans. p. 13], which permitted the state Supreme Court to, and it did, advance the hearing of same.

The learned judge of the District Court, in passing upon this question, used this language [trans. p. 41]:

"The question is asked, however, how is this court to know whether or not it would be reversed or modified until the appeal is finally disposed of. That can be ascertained by an inspection of the record, or *by postponing the matter until the Supreme Court acts. The referee pursued the latter course in this matter. This practice was approved in Bank of America v. Wheeler, 28 Conn. 433; Dawson v. Daniel, 7 Fed. Cases 3668, and by the Supreme Court of California in Dore v. Southern Pacific Company, 163 Cal. 195.*"

We believe that the learned District Court was right in allowing the claim of Douglas to be filed as allowable and provable against the bankrupt estate; therefore, that judgment should now be affirmed.

Respectfully submitted,

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Attorney for Appellee.